

**IN THE HIGH COURT OF AUSTRALIA**

**MELBOURNE REGISTRY**

**NOS M 27, M 28, M 29 AND M 30 OF 2020**

**Minister for Home Affairs & Ors v DMA18 as litigation guardian for DLZ18**

**Minister for Home Affairs & Commonwealth v Marie Theresa Arthur as litigation  
representative for BXD18**

**Minister for Home Affairs & Commonwealth v FRX17 as litigation representative for  
FRM17**

**Minister for Home Affairs & Commonwealth v DJA18 as litigation representative for  
DIZ18**

**APPELLANTS' OUTLINE OF ORAL ARGUMENT**

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Filed on behalf of the Appellants by:  
The Australian Government Solicitor  
Level 34, 600 Bourke Street  
Melbourne VIC 3000

Date of this document: 1 September 2020

File ref: 19004514

Telephone: 03 9242 1340  
Lawyer's email: [dejan.lukic@ags.gov.au](mailto:dejan.lukic@ags.gov.au)  
[louise.buchanan@ags.gov.au](mailto:louise.buchanan@ags.gov.au)  
Facsimile: 03 9242 1333

## **PART I INTERNET PUBLICATION**

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1. This outline of oral submissions is in a form suitable for publication on the internet.

## **PART II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT**

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### **The construction of s 494AB**

2. The sole purpose of s 494AB is to limit the jurisdiction of courts. It is not confined to challenges to the validity of exercises or non-exercises of power or to particular kinds of claims for relief: AS (FRX17) at [23]-[25]; Reply (DLZ18) at [12]
3. Each paragraph in s 494AB(1) refers to proceedings “relating to” a subject matter. The nexus thereby required is extremely wide, and should not be read down in the absence of a compelling reason for doing so: AS (FRX17) at [22]-[23]; Reply (DLZ18) at [13]
  - ***O’Grady v Northern Queensland Co (1990) 169 CLR 356 at 365, 367, 368, 374, 376 [JBA Vol 5 Tab 13]***
4. All of the paragraphs in s 494AB(1) relate to “transitory persons”, being unauthorised maritime arrivals who have been taken to RPCs under s 198AD. Section 494AB must be read together with s 494AA, which contains similar language and is directed to a like purpose, being to prevent (to the extent constitutionally possible) the use of litigation to frustrate the operation of the regional processing scheme. It is relevant to the construction of both provisions that they form part of a pattern within the Act of limiting court jurisdiction (including ss 474, 476A and 484): AS (FRX17) at [25]-[26]
  - ***Explanatory Memorandum, Migration Amendment (Excision from Migration Zone (Consequential Provisions) Bill 2001, [30]***
  - ***DBE17 v Minister (2018) 265 FCR 600 at [66]-[68], [75], [92], [128], [158]***
5. If s 494AB applies to a proceeding when instituted, its application cannot be escaped by amendment. If s 494AB does not apply to a proceeding when instituted, but the proceeding is then amended so that it relates to one of the subjects in s 494AB(1), the proceeding cannot thereafter be “continued”.

### **The pleadings in *FRM17* (Syd) and *BXD18* (Melb)**

6. ***FRM17***. The originating application as filed expressly referred to ss 198AD and 198AHA, and relied upon things done in the exercise of power under s 198AHA. The

relief sought in substance required removal to Australia: **ABFM at 7-8**. The further amended statement of claim pleaded that (a) FRM17 had been taken to Nauru under s 198AD, (b) certain things had been done under s 198AHA and (c) she should have been removed from Nauru: **ABFM at 17, 18, 20-21, 23-25, 34**; AS (FRX17) at [9]-[17].

7. **BXD18**. The statement of claim as filed pleaded that (a) BXD18 had been taken to Nauru under s 198AD, (b) certain things had been done under s 198AHA, and (c) a duty of care was owed in the exercise of statutory and non-statutory powers: **ABFM at 73, 80, 83, 85, 86, 88, 89**. The amended statement of claim relied on the same actions, but for the most part removed reference to the statutory provisions. Further, the amended reply alleged that s 198AHA ceased to apply to the respondent: **ABFM at 92-96, 101-104, 130-133**: AS (BDX18) at [5]-[14]; Reply (BXD18) at [10]-[11].

#### **Ground one – s 494AB(1)(ca)**

8. **First error**. The Full Court correctly accepted that s 198AHA confers “authority or capacity”, but incorrectly held that such statutory authority or capacity is not a kind of statutory “power”. In so holding, the Full Court inappropriately translated reasoning concerning non-statutory executive power to statutory power: AS (FRX17) [35].

- ***Plaintiff S195/2016 v Minister (2017) 261 CLR 622 at [27]; Plaintiff M68/2015 v Minister (2016) 257 CLR 42 at [132]-[136] (JBA Vol 5 Tab 14)***

9. There is no strict dichotomy between statutory powers and statutory capacities. The word “power” is commonly used in a manner that encompasses “capacities”: eg (a) s 61 of the Constitution; (b) s 198AHA; (c) necessary/convenient powers. The phrase “function, duty or power” plainly was not used in s 494AB(1)(ca) in order to limit s 494AB(1) so that it would permit proceedings relating to the performance or exercise of statutory capacities.

- ***Plaintiff S195/2016 v Minister (2017) 261 CLR 622 at [16], [18]; Edelsten v Health Insurance Commission (1990) 27 FCR 56 at 63; Hicks v Aboriginal Legal Service of WA (2001) 108 FCR 589 at [10]***

10. **Second error**. The Full Court misconstrued the word “under” and erred in relying on *Tang*, which was decided in an entirely different statutory context. AS (FRX17) at [40]-[42]; cf **FFC [197]**. In context, there was no warrant for confining s 494AB(1) to proceedings that affect rights.

- ***Griffith University v Tang (2005) 221 CLR 99 at [29], [59]-[60], [79]-[80] (JBA Vol 5 Tab 12)***

11. **Third error.** The Full Court’s reasons lead to the result that s 494AB(1)(ca) does not apply to negligence cases: see **FFC [204]-[208], [216]**; Reply (DLZ18) at [9]. That radically narrows s 494AB(1), and disregards the significance of ss 198AD and 198AHA to the negligence claims pursued: AS (FRX17) [43]-[45]; Reply (DLZ18) at [7]-[8]

**Ground two – s 494AB(1)(a)**

12. **Cross-appeal.** The approach in *DIZI8* (**FFC [289]-[290]**), taking account of the substance of the pleaded case and the position of s 198B in the statutory scheme, and looking beyond the fact that s 198B was not expressly pleaded, was correct. It was immaterial that s 198B was not the only power available to bring the applicant to Australia, because s 198B was the specific power enacted to allow transitory persons to be brought to Australia while otherwise preserving the status quo: AS (FRX17) at [53]

- **Sections 33, 42(1), 46B, 189, 198AD**

13. **Appeal.** In *FRX17*, *DLZI8* and *BXD18*, the Full Court elevated form over substance by attaching undue significance to whether the pleadings expressly mentioned transfer to Australia. In each case, the relief sought required the Commonwealth urgently to remove a transitory person from an RPC. As a matter of substance, an application that seeks that relief “relates to” s 198B unless some other specific place is mentioned: AS (FRX17) at [54]-[56]

**Ground three – s 494AB(1)(d)**

14. Ground 3 not pressed in *DLZI8* and *BXD18*. The cross-appeals in *DIZI8* and *BXD18* should fail, as the analysis in FFC [276] and [281], and [286], [291]-[292] (respectively) is correct.

**Cross-appeal and notice of contention**

15. There is no basis to doubt this Court’s power to remit proceedings within s 494AB: Reply (*BXD18*) at [17]

- ***Plaintiff S156/2013 v Minister* (2014) 254 CLR 28 at [20]**
- ***DBE17 v Commonwealth* (2019) 266 CLR 156 at [26]; *Plaintiff M169/2010 v Minister* [2011] HCATrans 108; *PI/2003 v Ruddock* [2003] HCATrans 787.**

Stephen Donaghue  
1 September 2020

Christopher Tran

Andrew Yuile